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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TYCO HEALTHCARE GROUP LP d/b/a	)	LEAD CASE NO. C08-03129 MMC
VNUS MEDICAL TECHNOLOGIES,)	
	)	CASE NO. C08-03129 MMC
Plaintiff,)	
	)	PLAINTIFF'S MOTION FOR LEAVE
v.	)	TO FILE THE DECLARATIONS OF DR.
	)	ROBERT T. ANDREWS, DR. WARREN
BIOLITEC, INC., DORNIER MEDTECH	)	S. GRUNDFEST, AND TERRY A.
AMERICA, INC., and NEW STAR LASERS,	)	FULLER IN FURTHER SUPPORT OF
INC. d/b/a COOLTOUCH, INC.,	)	ITS OPPOSITIONS TO DEFENDANTS'
	)	MOTIONS FOR SUMMARY
Defendants.	)	JUDGMENT

[CIVIL LOCAL RULE 7-3(d)]

TYCO HEALTHCARE GROUP LP d/b/a	)	CASE NO. C08-04234 MMC
VNUS MEDICAL TECHNOLOGIES,	)	(consolidated with Case No. C08-03129
	)	MMC)
Plaintiff,)	
)	
v.)	
)	
TOTAL VEIN SOLUTIONS, LLC d/b/a)	
TOTAL VEIN SYSTEMS,)	
)	
Defendant.)	

Pursuant to Civil Local Rule 7-3(d), Plaintiff Tyco Healthcare Group LP d/b/a VNUS Medical Technologies (“VNUS”) respectfully moves for leave to file the declarations of Dr. Robert T. Andrews (“Andrews Declaration”), Dr. Warren S. Grundfest (“Grundfest Declaration”), and Terry A. Fuller (“Fuller Declaration”) in further support of VNUS’s oppositions to Defendants’ motions for summary judgment (D.I. 202, 203, 206, and 207) in the forms attached hereto as Exhibits A, B, and C. These declarations from VNUS’s experts do not contain any substantive argument. Rather, they are intended to affirm the opinions expressed in the expert reports that VNUS cited in its opposition briefs, and thereby cure any purported deficiencies that Defendants claim prevent admission of the reports for the purposes of summary judgment.

VNUS believes that these declarations are unnecessary and that Defendants’ motions for summary judgment must be denied irrespective of whether they are admitted. First, there is ample admissible evidence apart from the Andrews, Fuller, and Grundfest expert reports to create genuine issues of material fact mandating denial of each motion, including significant deposition testimony and documentary evidence. Second, the Court has the discretion to consider the expert reports as evidence without the need for the supporting declarations. *See Single Chip Sys. Corp. v. Intermec IP Corp.*, No. 04CV1517 JAH (CAB), 2006 U.S. Dist. LEXIS 96527, at *17-20 (S.D. Cal. Nov. 6, 2006); *Competitive Techs., Inc. v. Fujitsu Ltd.*, 333 F. Supp. 2d 858, 863-64 (N.D. Cal. 2004).

In its Reply in Support of its Motion for Summary Judgment of Non-Infringement and in the Alternative for Summary Adjudication Limiting Damages, however, biolitec argues that the expert report of Dr. Andrews is inadmissible because it is unsworn. *See* D.I. 223 at 4. Therefore, to the extent the Court deems it necessary to address any purported evidentiary defect of VNUS’s expert reports, VNUS hereby requests leave to file the Andrews, Grundfest, and Fuller Declarations, which reaffirm under oath the opinions expressed in each expert’s respective report.¹ VNUS further requests that, upon filing of the declarations, the Court consider the excerpts of the

¹ The declarations affirm the opinions expressed in Exhibits 17, 18 and 41 to the Declaration of David J. Lisson in Support of Plaintiff’s Oppositions to Defendants’ Motions for Summary Judgment, dated July 9, 2010 (D.I. 208). Exhibits 17 and 41, which were filed under seal, are not attached to the corresponding Grundfest and Andrews Declarations in order to avoid additional unnecessary filings under seal. VNUS will resubmit these exhibits as attachments to the Andrews and Grundfest Declarations, however, should the Court deem resubmission necessary.

1 verified reports attached as Exhibits 17, 18 and 41 to the Declaration of David J. Lisson in Support
2 of Plaintiff's Oppositions to Defendants' Motions for Summary Judgment, dated July 9, 2010 (D.I.
3 208), as admissible evidence supporting VNUS's oppositions to Defendants' motions for summary
4 judgment.

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6 Dated: July 20, 2010

DAVIS POLK & WARDWELL LLP

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8 By: /s/ David J. Lisson

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